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Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01–19–01 OF 2013 AND W-01–44–02 OF 2013
ALIZATUL KHAIR, ABDUL AZIZ AND VARGHESE GEORGE JJCA
13 JUNE 2014

Labour Law — Trade dispute — Hearing by tribunal — Claim for recognitions — Class of workmen — Need to identify as those in 'Executive Scale E' — Bank refused to accord recognition — Secret ballot among employees — Whether there was corrupt practice — Whether there was 'trade dispute' between parties — Industrial Relations Act 1967

The second respondent ('ABOM') submitted to the appellant ('the bank') a 'claim for recognitions' under s 9(2) of the Industrial Relations Act 1967 ('the IRA'). The class of workmen in respect of whom ABOM sought recognition to represent was specifically identified by ABOM as those in 'Executive Scale E'. ABOM informed the Director General of Industrial Relations ('the DGIR') that the bank had refused to accord recognition as sought, causing the DGIR to request the bank to submit a list of the workmen 'in respect of whom the claim for recognition (is) made'. The bank submitted *Borang* B to the DGIR which listed out the particulars of their employees in Grade/Scale E and there was a total number of 211 employees identified. The bank also requested the DGIR to carry out a membership check vis-a-vis ABOM's right to represent the said employees by way of secret ballot. The DGIR then convened a meeting to discuss the mechanics/protocols related to the carrying out of the 'secret ballot' to determine whether a majority of that class of employees were in favour of ABOM representing them. This meeting was held and the agreements reached were set out in a 'surat persetujuan' of the same date executed by representatives of ABOM, the bank and DGIR. The process of secret balloting was held. However, the bank raised a complaint with the DGIR that corrupt practice had been perpetrated by ABOM, in that, all persons who had turned up and cast their ballots had been openly handed envelopes by ABOM containing a sum of RM30 each. It was contended that this had tainted the integrity of the outcome of the balloting and an investigation as to whether s 7 of the IRA had been violated, was asked for by the bank. Investigation revealed that the monies handed out by ABOM to the employees who had cast their ballots were subsidy to defray travelling expenses to the centres where the balloting was carried out. It was reported that the relevant staff at the HQ of the bank, where the balloting took place at the premises itself, had not been given any such monetary assistance. ABOM then invited the bank to commence collective bargaining and for that purpose forwarded to the bank proposals for

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a collective agreement to be entered in respect of the bank's employees in the position of 'Executive E, E1, E2 and E3'. The bank in their response to ABOM pointed out that ABOM had only been accorded recognition in respect of Grade E employees and since ABOM's proposal was also to encompass employees in Grades E1, E2 and E3 who were not within ABOM's scope of representation, the bank was not able to act and/or comment on the said invitation. The DGIR attempted to settle the differences that had emerged through negotiations, but this failed. The Minister decided that a 'trade dispute' had arisen between the parties in respective of the proposed collective agreement and pursuant to s 26(2) of the IRA proceeded to refer the same to the Industrial Court for a decision.

Held, allowing the appeal W-01–19–01 of 2013

(1) The bank's first complaint in the recognition certiorari application, namely, that the 'secret ballot' process had been tainted by corrupt practise, was duly investigated by DGIR and the Minister's decision was based on a report that had been given to the Minister. This aspect of the Minister's decision to overrule the complaint and proceed to accord recognition to ABOM was based on the outcome of investigations by DGIR and was therefore a rational decision in the circumstances. This decision was also unassailable considering the uncontradicted fact that the payments were only made by ABOM after the votes were cast and in any event no such payment had been made to HQ staff as the voting process was conducted within their premises itself. No improper motive or bad faith could be imputed as against ABOM in this respect (see paras 36–37).

(2) The number of employees in Executive Scale E, E1, E2, E3 was in the region of 2,000–4,000 persons. That was definitely not the intention of ABOM when it presented a claim for recognition under s 9(2) of the IRA and what was agreed to by ABOM was to ascertain validity of representation in respect of the 210 named individuals only and not in respect of others within the larger count. If however such indeed was ABOM's intention, they ought to have made this clear from the outset. The move now by ABOM to extend the limits of the recognition granted was indeed unacceptable as it was obvious that ABOM was seeking by stealth to represent a wider category of workmen by misleading both the DGIR and the bank; this could not be condoned by the court (see para 42).

(3) The Minister's decision was not flawed or impaired by any illegality, irrationality or procedural impropriety. To that extent the court agreed with the decision of the review judge. There was also no vagueness or ambiguity as to extent or scope of recognition granted to ABOM in this case. The recognition accorded by the bank pursuant to the direction of

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the Minister was only as to Executive Scale E employees whose number was limited to the 210 named employees as agreed to by ABOM, and no more (see para 45).

(4) With regard to the reference of a trade dispute to the Industrial Court pursuant to s 26(2) of the IRA, the exercise of the Minister's power was more discretionary in nature. Also, such exercise of discretion was circumscribed by s 26(3) (see para 46).

(5) The Minister's attempt to dismiss or minimise the significance of this issue as merely an 'afterthought' raised by the bank, was irrational and unreasonable, given all the circumstances of the matter. The Minister, obviously did not make any indepth analysis or ask the right questions as to ABOM's right to represent E1, E2 and E3 employees; the recognition accorded was in respect of 210 executives in Scale E only in any case. There was no doubt that the Minister had not taken into consideration relevant matters before invoking s 26(2) in exercise of his discretion thereunder to make a reference of a supposed 'trade dispute' to the Industrial Court (see paras 60–61).

[Bahasa Malaysia summary

Responden kedua ('ABOM') telah mengemukakan kepada perayu ('bank') satu tuntutan bagi pengiktirafan di bawah s 9(2) Akta Perhubungan Perusahaan ('APP'). Kelas pekerja-pekerja yang ABOM mohon bagi pengiktirafan untuk diwakili telah dikenal pasti secara khas oleh ABOM sebagai Eksekutif Skala E. ABOM memaklumkan kepada Ketua Pengarah Perhubungan Perusahaan ('DGIR') bahawa bank enggan menuruti pengiktirafan yang dipohon, menyebabkan DGIR memohon kepada bank untuk menyerahkan senaran pekerja yang mana tuntutan pengiktirafan dibuat. Bank menyerahkan Borang B kepada DGIR yang menyenaraikan kesemua butir-butir pekerja-pekerja mereka dalam Gred/Skala E dan terdapat bilangan keseluruhan 211 pekerja yang dikenal pasti. Bank juga memohon kepada DGIR untuk menjalankan pemeriksaan keahlian berkenaan hak ABOM untuk mewakili pekerja-pekerja tersebut melalui satu undian rahsia. DGIR kemudiannya memulakan satu mesyuarat untuk membincangkan perkara-perkara mekanikal/protokol-protokol yang terlibat dalam menjalankan 'undian rahsia' ini untuk memutuskan sama ada majoriti kelas pekerja tersebut bersetuju agar ABOM mewakili mereka. Mesyuarat ini diadakan dan persetujuan-persetujuan yang dicapai dinyatakan dalam surat persetujuan dalam tarikh yang sama dilaksanakan oleh wakil-wakil ABOM, bank dan DGIR. Proses undian rahsia dijalankan. Walau bagaimanapun, bank membangkitkan aduan kepada DGIR bahawa amalan rasuah telah dilakukan oleh bank, yang mana, kesemua orang yang hadir dan mengundi telah diberikan sampul surat oleh ABOM secara terbuka, setiap satu mengandungi RM30 seorang. Dihujahkan bahawa ini mencemar integriti hasil undian dan satu penyiasatan mengenai sama ada s 7 APP telah dilanggar, diminta oleh

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bank. Penyiasatan menunjukkan bahawa wang-wang yang dikeluarkan oleh ABOM kepada pekerja-pekerjanya yang telah mengundi merupakan subsidi untuk membayar kos-kos perjalanan ke pusat di mana undian dijalankan. Dilaporkan bahawa kakitangan yang relavan di ibu pejabat bank, di mana undian dilakukan di premis itu sendiri, tidak diberikan sebarang bantuan kewangan. ABOM kemudiannya mempelawa bank untuk memulakan tawar-menawar kolektif dan bagi tujuan tersebut menghantar tawaran-tawaran agar perjanjian kolektif dimasuki bagi pekerja-pekerja bank dalam jawatan Eksekutif E, E1, E2 dan E3. Bank, sebagai respon kepada ABOM, menyatakan bahawa ABOM telah diberikan pengiktirafan bagi pekerja-pekerja Gred E dan oleh kerana tawaran ABOM meliputi pekerja-pekerja Gred E1, E2 dan E3 yang tidak berada dalam skop perwakilan ABOM, bank tidak dapat bertindak dan/atau komen mengenai pelawaan tersebut. DGIR bercadang untuk menyelesaikan perbezaan-perbezaan yang timbul daripada rundingan-rundingan, tetapi ini gagal. Menteri memutuskan bahawa 'pertikaian perdagangan' telah timbul antara pihak-pihak berkenaan perjanjian kolektif yang dicadangkan dan di bawah s 26(2) APP, meneruskan untuk merujuk yang sama kepada Mahkamah Perusahaan bagi keputusan.

Diputuskan, membenarkan rayuan W-01–19–01 Tahun 2013

(1) Aduan pertama bank dalam permohonan certiorari pengiktirafan, iaitu, bahawa proses undi rahsia telah dicemari oleh amalan rasuah, telah disiasat dengan sewajarnya oleh DGIR dan keputusan Menteri adalah berdasarkan laporan yang telah diberikan kepada beliau. Aspek keputusan Menteri untuk membatalkan aduan tersebut dan meneruskan untuk memberikan pengiktirafan kepada ABOM adalah berdasarkan kepada hasil siasatan oleh DGIR dan oleh itu, adalah keputusan yang rasional dalam hal keadaan tersebut. Keputusan ini juga tidak dapat disangkal memandangkan percanggahan fakta bahawa pembayaran hanya dibuat oleh ABOM selepas undian telah dibuat dan, dalam apa jua keadaan tiada pembayaran yang dibuat kepada kakitangan ibu pejabat kerana proses pengundian dijalankan di dalam premis mereka sendiri. Tiada motif yang salah atau niat jahat boleh dikaitkan berbanding ABOM dalam hal ini (lihat perenggan 36–37).

(2) Bilangan kakitangan Eksekutif Skala E, E1, E2, E3 adalah sekitar 2,000–4,000 orang. Ini pastinya bukan niat ABOM apabila ia mengemukakan tuntutan untuk pengiktirafan di bawah s 9(2) APP dan apa yang telah dipersetujui oleh ABOM adalah untuk menentukan kesahihan perwakilan berkenaan dengan 210 individu yang dikenal pasti sahaja dan bukan berkenaan orang lain dalam kiraan yang lebih besar. Walau bagaimanapun, itu sememangnya niat ABOM, kesemuanya sepatutnya diperjelaskan dari awal lagi. Langkah oleh ABOM untuk melanjutkan had pengiktirafan yang diberikan sememangnya tidak boleh diterima kerana jelas bahawa ABOM telah memohon secara

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senyap untuk mewakili kategori pekerja-pekerja yang lebih luas dengan mengelirukan kedua-dua DGIR dan bank; ini tidak dapat dibenarkan oleh mahkamah (lihat perenggan 42).

(3) Keputusan Menteri tidak cacat atau terjejas oleh mana-mana ketidaksahan, ketidakrasionalan atau kesalahan prosedur. Setakat itu, mahkamah bersetuju dengan keputusan hakim semakan. Tidak terdapat juga sebarang kesamaran atau kekaburan berkenaan tahap atau skop pengiktirafan yang diberikan kepada ABOM dalam kes ini. Pengiktirafan diberikan oleh bank menurut arahan Menteri hanya untuk Eksekutif Skala E yang mana jumlah pekerja adalah terhad kepada 210 pekerja yang dikenal pasti seperti yang dipersetujui oleh ABOM, dan tidak lebih (lihat perenggan 45).

(4) Berkenaan dengan rujukan pertikaian perusahaan ke Mahkamah Perusahaan menurut s 26(2) APP, penggunaan kuasa Menteri adalah lebih bersifat budi bicara. Tambahan lagi, penggunaan sebarang langkah budi bicara terbatas oleh s 26(3) (lihat perenggan 46).

(5) Percubaan Menteri untuk menolak atau mengurangkan kepentingan isu ini sebagai 'afterthought' yang dikemukakan oleh bank, adalah tidak rasional dan tidak munasabah, melihatkan pada hal keadaan perkara tersebut. Menteri, jelas tidak membuat apa-apa analisis mendalam atau bertanyakan soalan-soalan yang betul tentang hak ABOM untuk mewakili pekerja-pekerja E1, E2 dan E3; pengiktirafan yang diberikan adalah berkenaan dengan 210 eksekutif di bawah Skala E sahaja dalam apa jua keadaan. Tiada keraguan bahawa Menteri tidak mengambil kira perkara-perkara yang berkaitan sebelum membangkitkan s 26(2) dalam menjalankan budi bicaranya di bawahnya untuk membuat rujukan 'pertikaian perdagangan' yang sepatutnya ke Mahkamah Perusahaan (lihat perenggan 60–61).]

Notes

For a case on hearing by tribunal, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 1946.

Cases referred to

Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)

Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305, CA (consd)

Pahang South Union Omnibus Co Bhd v Ministry of Labour and Manpower & Anor [1981] 2 MLJ 199, FC (refd)

Legislation referred to

Industrial Relations Act 1967 ss 2, 7, 9, 9(1), (2), (3), (4), (4B)(b), (4C), (5), (6), 20(3), 26(2), (3)

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Industrial Realtions Regulations 1980 reg 4(1)(a) A

Appeal from: Application for Judicial Review Suit Nos R1–25–507 of 2010 and R1–25–111 of 2011 (High Court, Kuala Lumpur)

M Pathmanathan (S Rutheran and Shirin Pathmanathan with him) (R Sivagnanam & Assoc) for the appellant. B
Maisarah bt Juhari (Natra bt Idris with her) (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.
VK Raj (R Chandra Segaran and Ravindra Murugavell with him) (P Kuppusamy & Co) for the second respondent. C

Varghese George JCA:

[1] The two appeals before us arose from separate judicial review proceedings filed at the High Court by the same applicant ('the appellant') against the same respondents. D

The parties had agreed there that the outcome of Application No R1–25–507 of 2010 would bind Application No R1–25–111 of 2011 and accordingly a single decision had been issued by the learned review judge. E

[2] Civil Appeal No W-01–44–02 of 2013 was in respect of the decision in R1–25–507 of 2010 while Civil Appeal No W-01–19–01 of 2013 arose from the decision in R-25–111 of 2011. F

Counsel for the parties at the outset informed us that the parties had similarly agreed amongst themselves that the outcome of Civil Appeal No W-01–19–01 of 2013 would follow our decision in Civil Appeal No W-01–44–02 of 2013. G

However, having considered the material before us and the submissions of counsel, we were of the view that the appeals merited separate assessment, notwithstanding that they had been heard together, both at the High Court and by us. H

BACKGROUND

[3] On 30 September 2008 the second respondent (also known as Association of Bank Officers Peninsular Malaysia and hereafter referred as 'ABOM') submitted to the appellant ('the bank') a 'claim for recognitions' under s 9(2) of the Industrial Relations Act 1967 ('the IR Act'). I

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[4] The class of workmen in respect of whom ABOM sought recognition to represent was specifically identified by ABOM as those in — 'Executive Scale E'.

[5] On 22 October 2008 ABOM informed the Director General of Industrial Relations ('the DGIR') that the bank had refused to accord recognition as sought.

[6] Thereupon the DGIR pursuant to reg 4(1)(a) of the Industrial Relations Regulations 1980 requested the bank by letter of 17 March 2009 to submit a list of the workmen 'in respect of whom the claim for recognition (is) made'.

[7] The bank in response, by letter of 14 April 2009 submitted to DGIR *Borang* B which listed out the particulars of their employees in Grade/Scale E and there was a total number of 211 employees identified by name in that grade/scale.

The bank also requested the DGIR to carry out a membership check vis-a-vis ABOM's right to represent the said employees (Grade/Scale E) by way of secret ballot.

[8] The DGIR wrote on 30 November 2009 to the Director General of Trade Union ('the DGTU') to do the needful to decide on the *competency of ABOM* to represent the class of employees in respect of whom recognition was being sought by ABOM (s 9(4B)(b) of the IR Act).

[9] As it transpired however, the bank agreed that ABOM was competent to represent employees in Grade E since previously ABOM had represented the same category of employees in the predecessor employer, AmBank Bhd.

The pertinent part of the bank's letter of 11 January 2010 to DGIR in this respect was as follows:

> Untuk pengetahuan pihak tuan, tuntutan pengiktirafan oleh pihak kesatuan melalui Borang A *adalah hanya untuk Executive Scale E sahaja.* Sebenarnya, sebelum ini ABOM pernah mewakili pegawai scale E (Pegawai Gred yang terendah sekali dalam kategori Executive) dalam AmBank Berhad ...
>
> Bank tidak mempunyai sebarang halangan untuk ABOM mewakili gred yang sama di AmBank (M) Berhad dan telah memohon Jabatan Perhubungan Perusahaan untuk mengendalikan satu Undi Sulit (Secret Ballot) di bawah Kaedah 62.
>
> (Emphasis added.)

[10] The DGIR then convened a meeting to discuss the mechanics/protocols related to the carrying out of the 'secret ballot' to

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determine whether a majority of that class of employees were in favour of ABOM representing them. This meeting was held on 2 June 2010 and the agreements reached were set out in a 'surat persetujuan' of the same date executed by representatives of ABOM, the bank and DGIR.

[11] The *surat persetujuan* at *Lampiran* A1 of that document listed out the employees in *Grade* E amongst whom the secret ballot was to be carried out (in *No 210*) and at the foot of the list it was expressly stated:

> Kami dengan ini bersetuju dengan senarai pekerja yang layak mengundi seperti di atas.

The signatures of representatives of ABOM, the bank and of DGIR was affixed below this statement.

[12] The process of secret balloting was held on 21, 24 and 31 July 2010 at various offices of the bank and the result from this initial round of balloting indicated that 51% of the 210 listed employees in Grade/Scale E were members of the ABOM.

[13] The bank however on 2 August 2010 raised a complaint with the DGIR (followed up with a further letter of 9 August 2010) that corrupt practice had been perpetrated by ABOM, in that, all persons who had turned up and cast their ballots thus far, had been openly handed envelopes by ABOM containing a sum of RM30 each. It was contended that this had tainted the integrity of the outcome of the balloting and an investigation as to whether s 7 of the IR Act had been violated, was asked for by the bank.

[14] On 17 September 2010 at a meeting with the bank's representatives, the DGIR informed, (as it would appear after investigations were carried out) that the monies handed out by ABOM to the employees who had cast their ballots were subsidy to defray travelling expenses to the centres where the balloting was carried out. It was reported that the relevant staff at the HQ of the bank, where the balloting took place at the premises itself, had not been given any such monetary assistance.

[15] In any event, according to DGIR such cash was only handed out *after the ballots were cast* by the employee concerned. The DGIR also informed the bank that further balloting would not be carried out since a majority of the listed employees had already voted to be represented by ABOM and accordingly a report would be submitted to the first respondent ('the Minister'). It need to be noted here that the stated 'majority' was derived as against the 210 listed employees in *Lampiran* A as the base figure.

[16] On 22 October 2010 the Minister pursuant to s 9(5) of the IR Act

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issued *Borang* F, the decision and direction with reference to ABOM's application for recognition (30 September 2008) which was set out in the following terms:

> AmBank (M) Berhad memberi pengiktirafan kepada Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia (ABOM) mulai daripada 30.09.2008 mengenai semua pegawai *Executive Scale E* kecuali kumpulan pengurusan, sulit atau keselamatan.

(Emphasis added.)

Borang F was extended to the bank by the DGIR vide the latter's letter of 27 October 2010.

[17] On 17 December 2010, ABOM then wrote to the bank inviting the bank to commence collective bargaining and for that purpose forwarded to the bank proposals for a collective agreement to be entered in respect of bank's employees in the position of 'Executive E, E1, E2 and E3'.

[18] The bank on 3 January 2011 in their response to ABOM pointed out that ABOM had only been accorded recognition in respect of Grade E employees and since ABOM's proposal (vis a vis the collective agreement) was also to encompass employees in Grades E1, E2 and E3 who were not within ABOM's scope of representation, the bank was not able to act and/or comment on the said invitation. This position of the bank in respect of ABOM's invitation to enter into a collective bargaining exercise was further elaborated and reaffirmed in the bank's further letter of 10 January 2011 as well.

[19] ABOM's response of 12 January 2011, inter alia, included the following statement:

> In a claim for recognition under s. 9(2) the Union is required to go by capacity of employment, i.e. Managerial, Executive, Confidential or Security. Our claim for recognition was in respect of all executives who are classified under scale E. This scale would by right include E1, E2, E3. It appears now that you are disputing the fact that those in E1, E2 and E3 are executives.
>
> ...
>
> ...
>
> Your allegation that the secret ballot conducted in July 2010 did not encompass E1, E2 and E3 is irrelevant to the Union. The secret ballot was conducted by Industrial Relations, Ministry of Human Resources.

[20] The DGIR attempted to settle the differences that had emerged (re scope of collective bargaining) through negotiations, but this failed.

The Minister thereupon on 31 March 2011, as it appears, decided that a 'trade dispute' had arisen between the parties in respective of the proposed 'collective

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agreement' and pursuant to s 26(2) of the IR Act proceeded to refer the same to the Industrial Court for a decision.

[21] The letter of DGIR of 1 April 2011 to the President Industrial Court in this respect was to the following effect:

> 2. Dimaklumkan bahawa YB Menteri Sumber Manusia telah memutuskan bahawa pertikaian di antara Persatuan Pegawai-Pegawai Bank Semenanjung Dengan AmBank (M) Bhd mengenai Perjanjian Kolektif *dirujuk* ke Mahkamah Perusahaan di bawah seksyen 26(2) Akta Perhubungan Perusahaan 1967 untuk satu keputusan.
>
> (Emphasis added.)

Appeal W-01–44–02 of 2013 (certiotari application — R1–25–507 of 2010 decision of Minister of 22 October 2010) (Borang F)

[22] This application (*recognition certiorari*) by the bank was to quash the decision of the Minister of 22 October 2010. The principal contentions of the bank here were that:

(a) the integrity of the 'secret ballot' process had been compromised or tainted in that those who participated had been bribed with a cash payment to cast their votes in favour of ABOM; and/or in the alternative; and

(b) the scope of the recognition granted and stated in *Borang* F in so far as to who were actually covered by the recognition, namely — '... *mengenai semua pegawai Executive Scale E kecuali* ...', was ambiguous or vague to constitute a valid decision.

[23] It was submitted that in coming to that decision the Minster had disregarded the irregularities and other relevant considerations raised by the bank, and therefore the decision had to be struck down as invalid.

Appeal W-01–19–01 of 2013 (certiorari application — R1–25–111 of 2011) decision of Minister of 30 March 2011/1 April 2011 to refer a 'trade dispute' to the Industrial Court on the terms of a proposed collective agreement

[24] This application *(trade dispute certiorari)* was for review of the Minister's decision (filed on 18 May 2011). The thrust of the bank's complaints here were that:

(a) the Minister's decision was premised upon a flawed recognition order (which was the subject of proceedings R1–25–507 of 2010); and

(b) *in any event*, the scope of ABOM's recognition to represent employees of the bank was *only* in respect those executives in Scale E and did not extend to give ABOM the right to negotiate for or to enter into any

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collective agreement, for those others in '... E1, E2, E3' categories of employees at the bank (as invited to/proposed by ABOM to be covered in the collective agreement as well).

[25] It was submitted that the Minister had rushed to hold that there was a 'trade dispute' over the terms of a proposed 'collective agreement' without giving sufficient consideration to the issues raised by the bank, particularly as to the locus of ABOM to represent employees in the categories E1, E2 and E3 as well. It was urged upon the court (both before us and below) that the Minister's purported reference of a 'trade dispute' to the Industrial Court was in the circumstances illegal and irrational and in any event premature, that is, it was made even before ABOM had secured recognition to represent categories E1, E2 and E3 employees at the bank.

HIGH COURT

[26] The learned judge sitting in review in dealing with the allegation that the 'secret ballot' was tainted (in the recognition certiorari) stated:

> ... this Court had looked closely at the affidavit in reply of the Minister to see how he has dealt with this issue, because in this kind of case, the court could only act based on what the Minister had done in coming to his decision that is now being impugned. From his affidavit in reply the Minister had said categorically that the DGIR had investigated and considered this particular grievance as raised by the applicant. It was found as a result thereof that such payment of RM30 was not against the second respondent's constitution nor was it illegal as they were given in order to reimburse travelling of the voters. Based on that explanation the results of the secret ballots done in Penang, Alor Setar and Ipoh were valid and regular. This was contained in para 8.4 of the Minister's affidavit in reply. To fortify his conclusion the Minister had also averred in para 8.5 of his affidavit in reply that the applicant had never raised any objection to the DGIR when the latter announced the result of the investigation into such complaint on the 17 September 2010. Instead both had requested for the matter on this claim for recognition to be proceeded with, for the decision of the Minister. This court, with respect, would agree with the contention by the learned counsel for the second respondent that the above materials were placed before to and made available to the Minister before he had decided in the manner that he did in rejecting the applicant's grievance on the alleged corrupt practice on ....

[27] As regards the 'Category E issue' (in trade dispute certiorari application) the learned judge's noted in His Lordship's judgment as follows:

> The gist of the applicant's grievance here seemed to be centred on the argument that the Minister had failed to appreciate that there existed differences between employees in Scale E Executive capacity and those executives in Scales E1, E2 and E3. Having perused through the documents placed before the Minister, there is nothing to substantiate what the significant differences were, if they indeed existed. In fact, they were not brought to the attention of the DGIR during the exercise prior

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> to the latter referring the same to the Minister. Going back to the legal provisions concerned with this issue, s 9(1) of the IRA 1967 would be relevant. From a reading of this provision, there is no sub-division of the executive capacity according to seniority. So under the law, the applicant's contention on this issue on the subdivision involving the E category cannot be viewed as a valid point of contention ...

[28] The learned judge went on to finally hold that:

> (The Minister) had taken into account all relevant considerations and ignored all irrelevant considerations, in arriving at his decision. Clearly still, the Minister had not been guilty of any procedural impropriety in coming to his decision the way he did. Indeed, this court is of the view that a reasonable person similarly circumstanced as the Minister would have concluded in the like manner as did the Minister in this case. As such, the first respondent's decision does not suffer from any of the infirmities that would have otherwise rendered his decision as a perverse decision which cannot be allowed to stand and which of necessity must be quashed by this court.

OUR OPINION

The law

[29] The principles governing the approach to be taken in dealing with judicial review applications have been well and authoritatively laid down in a number of cases. Basically the court in such a context was to be mindful that it was not exercising appellate jurisdiction but merely considering whether to extend its 'curial intervention' pursuant to its supervisory jurisdiction (that is, over inferior tribunals or administrative or quasi judicial decision makers).

[30] It has been accepted by the courts too that although as a matter of first principle judicial review was concerned primarily with the decision making process (not the merits, substance or justification), there was an exception to that rule where the court could still go behind the decision, where the allegations raised were to the effect that the decision maker had transgressed principles of procedural impropriety, illegality or irrationality (may be even proportionality) in arriving at the impugned decision.

In those circumstances it was open to the court to extend its scrutiny into the area of the merits or justification behind that decision.

[31] More to the point at hand, we have judicial pronouncements which make it clear that the Minister's exercise of discretion or administrative powers under the provisions of the IR Act must always be within the objectives of the legislation and the scope of his statutory responsibilities.

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The Federal Court in *Pahang South Union Omnibus Co Bhd v Ministry of Labour and Manpower & Anor* [1981] 2 MLJ 199(a recognition case) through Abdoolcader J noted:

> We can see no reason or justification for interfering with his decision on an application of the principles governing scope of judicial review we have administrated. The court cannot substitute its own judgment for that of the first respondent and *will invalidate the exercise of his judgment or discretion only if satisfied that no reasonable person charged with his statutory responsibilities and with a due and proper appreciation of his statutory duties could have exercised his power in the way that he did*.

(Emphasis added.)

[32] Hashim Yeop Sani CJ (Malaya) in the Supreme Court case of *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 (a case involving the Minister's discretion under s 20(3) of the IR Act), summarised the position of the law involved as:

> The Minister's discretion under s 20(3) is wide but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court *unless he had misdirected himself in law or had taken into account irrelevant matter or had not taken into consideration relevant matters or that his decision militates against the object of the statute*. Otherwise he had a complete discretion to refer a complaint ....

(Emphasis added.)

[33] The Court of Appeal in *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305, speaking through Shaik Daud Md Ismail JCA said, that even where the statute mentioned a subjective formulation for the Minister's exercise of power (there, in respect of a reference to Industrial Court under s 20(3), where it was provided — '... may, if he thinks fit ...'), the exercise of such discretion or power was not a mechanical one. The Minister had to make a thorough study of all aspects of the case and only then would it's stand not be overruled.

> Whether a reference is made, therefore, depend on the facts and circumstances of each particular case. The court will only interfere when there is evidence to show that the discretion was exercised unlawfully.

[34] The above principles were in the forefront of our minds in our consideration of the controversy before us in so far as the recognition certiorari was concerned.

RECOGNITION CERTIORARI APPLICATION/APPEAL

[35] In our reading of s 9(5) of the IR Act, the Minister's decision pursuant to this provision was more in the nature of an administrative act. The Minister

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was to decide upon receipt of the notification from the DGIR (s 9(4C)) (ie after the exercise to determine the competence and the right of the union to represent the claimed employees) to accord recognition and such decision was to be final and was not to be questioned in any court (s 9(6)).

[36] We note that the bank's first complaint in the recognition certiorari application, namely, that the 'secret ballot' process had been tainted by corrupt practise, was duly investigated by DGIR and the Minister's decision was based on a report that had been given to the Minister.

The Minister at para 8.4 of the affidavit in reply averred as follows:

> 8.4 KPPP setelah meneliti dan mengambil kira aduan yang dikemukakan mendapati bahawa pemberian wang oleh Responden kedua kepada pekerja-pekerja eksekutif Pemohon (ahlinya) sebanyak RM30.00 selepas mengundi tidak menyalahi undang-undang serta perlembagaan kesatuan dan tidak boleh dikira sebagai rasuah kerana pemberian wang tersebut dianggap sebagai perbelanjaan perjalanan ahlinya yang keluar mengundi. Oleh itu keputusan undi sulit yang telah dijalankan di Pulau Pinang, Alor Setar dan Ipoh pada 31 July 2010 adalah teratur dan sah sebagaimana peraturan.

[37] This aspect of the Minister's decision to overrule the complaint and proceed *to accord recognition* to ABOM was based on the outcome of investigations by DGIR and was therefore a rational decision in the circumstances. This decision was also, in our view, unassailable considering the uncontradicted fact that the payments were only made by ABOM after the votes were cast and in any event no such payment had been made to HQ staff as the voting process was conducted within their premises itself. No improper motive or bad faith could be imputed as against ABOM in this respect.

[38] Further, as regards the granting of the 'recognition' itself, it was our further view that there was no vagueness or ambiguity as to the extent of the recognition granted to ABOM.

The material part of the Minister's decision in *Borang* F was that the bank '... memberi pengiktirafan' to ABOM. '... mengenai *semua pegawai Executive Scale E* kecuali kumpulan pengurusan, sulit atau keselamatan'.

On the question as to who actually constituted or were covered by '... semua pegawai Executive Scale E ...'. it was our view that the answer to that had to be determined from within the context of the statutory process involved in ABOM's claim for the right of representation that had been carried out in this particular case.

[39] In this respect, reference had necessarily to be made to the *Borang* A submitted by ABOM, the *Borang* B furnished by the bank and more significantly the *surat persetujuan* of 2 June 2010 executed both by ABOM and

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the bank before the representative of the DGIR.

It need to be highlighted here that *Borang* B submitted by the bank (in response to ABOM's *Borang* A) listed 211 employees within that class/category. The list was reduced to 210 named individuals as was set out expressly in *Lampiran* A-1 to the *surat persetujuan*. This list was agreed to and acknowledged by ABOM when the *surat persetujuan* was executed by their own representative.

[40] As pointed out earlier, this 51% majority (who voted for ABOM to represent them) was determined as against this base number of 210 individuals that comprised Executive Scale E and by agreement they were identified and confirmed as the subject of the secret ballot exercise. This was conceded to as much by senior federal counsel appearing for the Minister before us.

[41] ABOM's contention however on the other hand was that the 'recognition' accorded to ABOM as Union extended to all 'Scale E Executives' with the bank (including those classified as E1, E2, E3 executives) and was not restricted to the said 210 identified for purposes of the recognition exercise. This formed the basis of the bank's further complaint taken in the recognition certiorari application that the Minister's decision thereto was ambiguous or vague and had to be quashed.

[42] We were not in agreement with ABOM's aforesaid submission. Admittedly the number of employees in Executive Scale E, E1, E2, E3 was in the region of 2,000–4,000 persons. That (scope of representation) was definitely not the intention of ABOM when it presented a claim for recognition under s 9(2) of the IR Act and what was agreed to by ABOM was to ascertain validity of representation in respect of the 210 named individuals only and not in respect of others within the larger count. If however such indeed was ABOM's intention, they ought to have made this clear from the outset. The move now by ABOM to extend the limits of the recognition granted was indeed unacceptable as it was obvious to us that ABOM was seeking by stealth to represent a wider category of workmen by misleading both the DGIR and the bank; this could not be condoned by the court.

[43] What needs to be remembered is the underlying scheme behind the provisions in Part III (Recognition and Scope of Representation of Trade Unions) and in particular s 9 of the IR Act. A trade union, the majority of whose members were not employed in managerial, executive, confidential or security capacities *could not* serve an invitation for collective bargaining (leading to a collective agreement on terms of service) for workmen in those managerial, executive, confidential or security capacities (s 9(1) of the IR Act).

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However, a trade union whose membership was specifically open to those in managerial, executive, confidential or security positions could represent such employees and in this respect a claim for recognition had to be firstly served under s 9(2) of the IR Act. The subsequent provisions, namely s 9(3), (4) and (5) were relevant as to the processes involved before any such recognition was granted to such a union.

[44] Given that was the scheme behind the said statutory provisions, it behoved upon ABOM (as the union seeking recognition to represent a category of the specific category of, so to speak, 'exempted' workmen) to specifically identify the scope of their representation and be forthright as to the extent/scope of recognition that was being sought. They could not (as now seemed to be the position taken) generalise and then seek the benefit of a wider representation, especially in this instant situation where a specific number/names of 210 individuals had been expressly agreed to by ABOM itself.

[45] In summary therefore with reference to the recognition certiorari application/appeal (subject of Appeal No W-01–44–02 of 2013), our conclusion was that the Minister's decision was not flawed or impaired by any illegality, irrationality or procedural impropriety. To that extent we agreed with the decision of the learned review judge.

There was also no vagueness or ambiguity as to extent or scope of recognition granted to ABOM in this case. The recognition accorded by the bank pursuant to the direction of the Minister was only as to Executive Scale E employees whose number was limited to the 210 named employees as agreed to by ABOM, and no more.

TRADE DISPUTE CERTIORARI/APPEAL

[46] However with regard to the reference of a trade dispute to the Industrial Court pursuant to s 26(2) of the IR Act, our view was that the exercise of the Minister's power was more *discretionary* in nature as it was qualified by the words — '... if he is satisfied that it is expedient so to do'. Also, such exercise of discretion was circumscribed by s 26(3) (measures as to a possible settlement of the trade dispute, to be looked into too, as a preliminary step).

[47] As regards the trade dispute certiorari application namely the reference of a 'trade dispute' to the Industrial Court (Appeal No W-01–19–01 of 2013) it must be stressed that ABOM's invitation (17 December 2010), at the foundation of this issue was to commence 'collective bargaining in respect of a proposed collective agreement to cover '... your executives in *E*, E1, E2 and E3 in your bank'.

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It is pertinent to note firstly that executives in Scale E was recognised here by ABOM as a distinct and separate group of employees apart for other executive in E1, E2 and E3 categories.

[48] As elaborated and held by us earlier above, the recognition ordered by the Minister to be accorded by the bank to ABOM, pursuant to s 9(5) of the IR Act was limited to *Executives E* only and not in respect of any other executives in the service of the bank. Accordingly ABOM lacked the necessary authority to hold out for and/or invite, much less engage in any collective bargaining for executives/employees in the categories known as E1, E2 and E3.

[49] ABOM themselves conceded that with the inclusion of executives/employees in category E1, E2 and E3 within the scope of ABOM's right to represent would mean that more than 2,000 persons would now be represented by ABOM when the employees in respect of whom recognition was sought and obtained was merely 210 executives as elaborated above. These individuals (or a majority of the 2,000), it must be appreciated, have not had the opportunity to indicate whether they in fact wanted ABOM to represent them.

[50] The significance of this lay in the fact that those in excess of the 210 had been clearly disenfranchised of their right to decide (by a majority of course) whether ABOM should represent them at all. The implication that flowed from that was even more far reaching, in that, the consequence of whatever was concluded in respect of the terms of service and included in the envisaged 'collective agreement' would bind all of them collectively; there was no avenue open for these individuals within the wider number, to be excluded if they were of the view that some terms were adverse to their interest or much worse, not favourable to them individually in comparison to their existing terms and conditions of service.

[51] Considering that:

(a) there must be a 'majority' first established to override the interest of 'minority' in so far as ABOM was to be the vehicle/union to represent all of the workers in that category; and

(b) the terms of the 'collective agreement' would have effect across the board to bind all in the wider number, overriding the terms of their individual contracts of employment,

it was clearly obligatory upon ABOM in law and under the provision of s 9 of the IR Act to first seek 'recognition' to represent E1, E2 and E3 executives/employees (as was done for Class E executives). This was an

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important precondition to be satisfied by ABOM before having authority or legal basis to represent those employees in E1, E2 and E3 categories in any collective bargaining.

[52] To avoid that step of obtaining prior recognition of the union as representing those in the wider number, would fly in the face of the statutory provisions relating to recognition of trade unions in respect of 'executives' as highlighted above. It was obvious and undeniable that ABOM had not sought for and had not been accorded the right of representation and therefore could not enter into collective bargaining for those E1, E2, E3 executives/employees.

[53] Simply stated, it had to be 'first step first'; ABOM had to obtain 'recognition' to represent E1, E2, E3 employees before proceeding to invite the bank for any collective bargaining to cover these employees.

This basic requirement of being accorded recognition to represent was, in our assessment, omitted or overlooked by the Minister when he held that a 'trade dispute' in respect of the terms and conditions of service had arisen in respect of Executives E, E1, E2 and E3 between ABOM and the bank. The Minister's exercise of discretion to refer the so called 'trade dispute' to the Industrial Court for determination, without the precondition being satisfied, tainted that decision firstly with illegality, as it contravened s 9 of the IR Act.

[54] 'Trade dispute' by s 2 of the IR Act was defined as 'any dispute between an employer and his worker which is connected with the employment or non-employment or *the terms of employment or the condition of work of any such workmen*'.

(Emphasis added.)

Hence it was premature of the Minister to proceed with the reference of a dispute between the bank (employer) and the workmen in categories E1, E2, E3 as to their terms and conditions of employment *until* ABOM had been accorded due recognition to represent these additional employees in the service of the bank.

[55] In Michael Fordham (QC), *Judicial Review Handbook*, at p 467 it is noted as follows:

> Precedent fact. The court will intervene to correct an erroneous conclusion on a question of precedent (or antecedent) fact, having examined any relevant (including fresh) material, and deciding the question for itself. The logic of a precedent fact questions, which are rare and elusive, is of an objective factual question whose existence is needed to 'trigger' the public body's proper function.

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The above commentary went on to state that 'precedent fact' was a well established doctrine and unless these facts existed there was no room for particular executive discretion to be exercised.

[56] In Mark Arouson, *Judicial Review of Administrative Action* (at p 203), the commentary on 'jurisdiction fact' was as follows:

> A jurisdiction fact is said to be a fact which must 'in truth' exist before the decision maker or official can validly act.
>
> The term 'jurisdiction fact' is used here (as in most of the cases) to include jurisdictional preconditions to valid action where those preconditions are essentially or relevantly factual, even if those preconditions include also mixed questions of law or fact.

[57] The prior recognition of ABOM pursuant to s 9 of the IR Act to represent E1, E2, E3 employees/executives in the bank was a 'precedent fact' or a 'jurisdictional fact' that had to exist first before any reference of a 'trade dispute' under s 26(2) of the IR Act could be lawfully made by the Minister to the Industrial Court. In this instant situation this was absent. The intention of the Legislature was clear. There had to be a proper recognition of the union (to represent the particular employees) before any collective bargaining towards conclusion of a collective agreement could be embarked upon.

[58] The Minister's response on this issue, (insofar as is directly relevant) appear from the affidavit in reply filed at paras 13–14, and include the following averment:

> 13 ...
>
> ... saya sesungguhnya percaya dan menyatakan bahawa tindakan Pemohon yang cuba mentafsirkan 'Eksekutif Skala E' tidak termasuk Gred E1, E2 dan E3 adalah bersifat 'afterthought' dan hanya suatu cubaan berbentuk teknikal bagi menggagalkan proses tuntutan pengiktirafan yang dibuat oleh Responden Kedua.

And

> 14.14.1. ...
>
> 14.2. ...
>
> 14.3. ...
>
> 14.4. Pengemukaan senarai nama pekerja oleh Pemohon di Borang B mengandungi pekerja-pekerja Pemohon yang berada dalam 'Eksekutif Skala E' yang merangkumi eksekutif Gred E1, E2 dan E3.
>
> 14.5. ...
>
> 14.6. ...
>
> 14.7. ...

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[59] The Minister was clearly wrong in stating that the 'senarai ('list of employees') in *Borang* B included employees/executives in categories E1, E2 and E3 as well. As pointed out earlier that list was only in respect of 210 workmen whilst, as even conceded by ABOM, the total number or executives/employees inclusive of those in categories E1, E2 and E3 would exceed 2,000 persons in all.

[60] The Minister's attempt to dismiss or minimise the significance of this issue (which went to the root of the scope of representation of ABOM) as merely an 'afterthought' raised by the bank, was in our view therefore irrational and unreasonable, given all the circumstances of the matter. The Minister, obviously did not make any indepth analysis or ask the right questions as to ABOM's right to represent E1, E2 and E3 employees; the recognition accorded was in respect of 210 executives in Scale E only in any case.

[61] There was no doubt in our mind that the Minister had not taken into consideration relevant matters before invoking s 26(2) in exercise of his discretion thereunder to make a reference of a supposed 'trade dispute' to the Industrial Court.

The invitation by ABOM to the bank to commence collective bargaining as it was presented, that is in respect of Executive E, E1, E2 and E3, as a whole, was defective or improper and ought to have been rejected by the Minister for the reasons elaborated upon above.

[62] It was our conclusion therefore that with respect to the 'reference of a trade dispute' certiorari application, the learned review judge ought to have allowed the application and quashed the learned Minister's decision. We therefore allowed the appeal in W-01–19–01 of 2013.

[63] Each party was ordered to bear their own costs in the matter in the circumstances.

Appeal W-01–19–01 of 2013 allowed.

Reported by Afiq Mohamad Noor